

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON AND VALDOSTA DIVISIONS**

UNITED STATES OF AMERICA,

v.

BERRIEN L. SUTTON,

Defendant.

CASE NO. 5:08-CR-40-2 (HL)

ORDER

This case is before the Court on the Recommendation of United States Magistrate Judge Charles H. Weigle (Doc. 406). Judge Weigle recommends that Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. 391) be granted. Judge Weigle also recommends that Defendant's motion to vacate be construed as a motion for writ of *coram nobis*, as it applies to the noncustodial aspects of Defendant's sentence, and that the writ be granted.

The Government filed an objection to the recommendation to grant the motion to vacate. The Government did not object to the recommendation to grant a writ of *coram nobis*. The Court has made a *de novo* review of the portion of the Recommendation to which the Government objected.

After much careful consideration, the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge (Doc. 406). The Court agrees that the indictment and stipulated facts set forth in the plea agreement do not describe a bribery or kickback scheme, and in Skilling v. United States, --- U.S. ---, 130 S.Ct. 2896, 2931 (2010), the Supreme Court held that honest services fraud

theories other than bribery and kickback schemes are invalid. Further, the Court agrees that the mail and wire fraud charges contained in Count I cannot stand on their own. The Government's objection is overruled.

Accordingly, Defendant's Motion to Vacate (Doc. 391) is granted. Defendant's conviction and sentence are vacated and set aside. Further, the writ of *coram nobis* is granted as to the non-custodial aspects of the sentence. The Government has 60 days under the law to appeal this Order. If the Government fails to exercise its right to appeal, it shall repay to Defendant all sums paid by Defendant on account of his fine and special assessment not later than ten days after the expiration of the appeal period.

SO ORDERED, this the 15th day of February, 2012.

s/ Hugh Lawson
HUGH LAWSON, SENIOR JUDGE

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